

ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE AMENDING AND CREATING A RULE

To amend Ins 5.17(5), 5.21(1) & (2) and 5.27(4); and to create Ins 5.21(2)(e), (f) and (g) and 5.25 (1)(c), Wis. Admin. Code, relating to administrative hearing procedures for OCI.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE (OCI)

1. Statutes interpreted:

ss. 227.45(7), 227.46, 600.01(2), 601.41(3), 601.42, 628.34(12), Stats.

2. Statutory authority:

ss. 600.01, 628.34 (12), Stats.

3. Explanation of the OCI's authority to promulgate the proposed rule:

OCI has set standards for the conduct of administrative hearings it holds. The existing rule has been in existence since 1996 and this change is clarification of some specific parts of that rule.

4. Related Statutes or rules:

See statutes interpreted in #1 above.

5. The plain language analysis and summary of the proposed rule:

This rule identifies specific sanctions allowed by the statutes and in circuit court and reinforces that they are available for use in administrative proceedings where a party defaults, fails to comply with a subpoena or fails to comply with discovery orders. Those additional sanctions are striking the pleadings, awarding expenses, imposing a forfeiture and any other statutory sanction allowed. Since the existing rule referenced certain penalties and not others, questions were from time to time raised regarding whether other statutory sanctions could be applied. The changes also specifically reference that the ALJ may consider and grant orders for summary judgment.

The rule sets a standard of "excusable neglect" for a Respondent to obtain relief from their default. The rule specifically lists penalties for failing to comply with discovery orders including striking the pleadings, awarding expenses, ordering a forfeiture on the Respondent, taking the allegations as true without further proof or hearing. Since the state of Wisconsin has sovereign immunity, monetary penalties cannot be imposed against the state.

In addition, the current address listed in the rule or OCI is corrected.

6. Summary of and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

There are no federal regulations which address Wisconsin administrative hearings.

7. Comparison of similar rules in adjacent states as found by OCI:

Iowa: Section 17A.12 the presiding officer may enter a default decision or proceed to take evidence in the absence of the default party. If the defaulting party wishes to contest the default, they must show "good cause" for the default.

Illinois: Statutory section 750 ILCS 25/10 permits the administrative hearing officer to proceed to hear the case based on the testimony of the petitioner and other evidence and make a decision. The Respondent can attempt to contest the default by filing a motion within 14 days of the default order.

Minnesota: Rule sections 1400.6000 and 1400.8560 deal with default situations and both allow the ALJ to take all allegations as true without further proof and to enter an appropriate order based on those facts.

Michigan: MI Admin. Code R 28.4013 (2004) Rule 13. If a party fails to appear after proper service of notice, the department, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

Indiana: Section 312 IAC 3-1-9 allows a Natural Resources Commission administrative law judge to enter a proposed order of default or proposed order of dismissal (Note: No provision could be found that specifically applied to insurance contested cases)

8. A summary of the factual data and analytical methodologies that OCI used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule:

This rule identifies certain motions, penalties and other administrative provisions which the statutes specifically allowed. The existing rule referenced some, but not all of these. This rule amendment makes clear that all statutory sanctions apply.

9. Any analysis and supporting documentation that OCI used in support of OCI's determination of the rule's effect on small businesses under s. 227.114:

Since the rule clarifies administrative procedures for Respondents who are in default or disobedient to orders issued by the administrative law judge, there is no significant effect on small businesses.

10. If these changes may have a significant fiscal effect on the private sector, the anticipated costs that will be incurred by private sector in complying with the rule:

Not applicable because there is no significant effect.

11. A description of the Effect on Small Business:

None

12. Agency contact person:

A copy of the full text of the proposed rule changes, analysis and fiscal estimate may be obtained from the WEB sites at: **<http://oci.wi.gov/ocirules.htm>, or <https://adminrules.wisconsin.gov>**

or by contacting: Inger Williams, Services Section, OCI, at:

Phone: (608) 264-8110

Email: Inger.Williams@OCI.State.WI.US

Address: 125 South Webster St – 2nd Floor Madison WI 53702

Mail: PO Box 7873, Madison WI 53707-7873

13. Place where comments are to be submitted and deadline for submission:

The deadline for submitting comments is 4:00 p.m. on the 14th day after the date for the hearing stated in the Notice of Hearing.

Mailing address:

Mr. Robert Luck
Legal Unit - OCI Rule Comment for Rule Ins 5
Office of the Commissioner of Insurance
PO Box 7873
Madison WI 53707-7873

Street address:

Mr. Robert Luck
Legal Unit - OCI Rule Comment for Rule Ins 5
Office of the Commissioner of Insurance
125 South Webster St – 2nd Floor
Madison WI 53702

WEB Site: <http://oci.wi.gov/ocirules.htm>

The rule changes are:

SECTION 1. Section Ins 5.17(5), Ins 5.21(1) and Ins 5.21(2)(intro) are amended to read:

Ins 5.17(5) ADDRESS. Unless otherwise ordered by the administrative law judge, the address for serving and filing documents with the office, the PCF Board, the HIRSP board or the administrative law judge is:

Office of the Commissioner of Insurance Attn: Legal Unit
125 South Webster Street Floor 2 ~~121 East Wilson Street~~
P. O. Box 7873
Madison, WI 53707-7873
Facsimile transmission number: 608-264-6228

Ins 5.21(1) FAILURE TO ANSWER OR APPEAR. (a) If a party, without reasonable excuse, other than due to excusable neglect, fails to file an answer by the date specified in the notice of hearing and or fails to appear at the prehearing conference and, or fails to appear at the hearing scheduled in the notice of hearing, the administrative law judge shall promptly issue and serve a final decision finding the party in default, accepting the opposing party's allegations as true and deciding the case based on those allegations. If proof of any fact is necessary for the administrative law judge to issue the decision the administrative law judge shall receive the proof.

(b) The administrative law judge may relieve a party from a default decision only if:

1. The party files a motion for relief within a reasonable time but not more than one year after the decision is mailed; and

2. The party establishes that the failure to file an answer or to appear was due to excusable neglect. For the purpose of this paragraph failure to receive a notice, pleading, decision, or other document in a proceeding is not a basis to establish excusable neglect if the notice, pleading, decision, or other document was mailed to the address of a licensee of the office at the address shown in the office records, to an address provided by the party in the course of the proceeding or to the address of an attorney representing the party. If the office does not have such an address, failure to receive the document does not establish excusable neglect if the document is mailed to an address the party represents to the public or otherwise as a business address.

Ins 5.21(2) SANCTIONS AGAINST DISOBEDIENT PARTY. If a party fails to disclose witnesses or evidence under s. Ins 5.35, fails to comply with a subpoena, fails to make a required appearance, fails to respond to discovery or fails to comply with an order issued by the administrative law judge, the administrative law judge, on his or her own motion or on a motion by an opposing party, may by order do any of the following which the administrative law judge considers just in relation to the disobedient party's failure:

SECTION 2. Sections Ins 5.21(2)(e), (f) & (g) and Ins 5.25(1)(c) are created to read:

Ins 5.21(2)(e) Strike the pleadings of the disobedient party or render a decision accepting the opposing party's allegations as true and decide the case based on the allegations, or both.

(f) Award expenses as provided under s. 804.12 (1) (c), (2) (b) or (3), Stats., against a party subject to an action brought by the office. Under this section, expenses cannot be awarded against the state or its agencies.

(g) Impose a forfeiture under s. 601.64, Stats., against a respondent subject to an action brought by the office for any violation of an order of the administrative law judge compelling discovery. An order compelling discovery issued by the administrative law judge to a respondent is an order under s. 601.41 (4), Stats. Under this section, a forfeiture cannot be imposed against the state or its agencies.

Ins 5.25(1)(c) An order granting summary judgment as to any issue or the entire matter under consideration. A motion for summary judgment shall be brought and decided in accordance with s. 802.08, Stats.

SECTION 3. Section Ins 5.27(4) is amended to read:

Ins 5.27(4) COMPLIANCE. In addition to the sanctions provided under s. Ins 5.21, a person who fails to comply with a subpoena issued under this section may be compelled as provided under s. 885.12, Stats., and may be subject to administrative sanctions including, but not limited to, sanctions for a violation of an order issued under ss. 601.41(4) and ~~s.~~ 601.42(4), Stats.

SECTION 4. These changes first apply to the remainder of any hearing, prehearing, motion hearing or administrative proceeding in process or any hearing or administrative proceeding commencing on or after the effective date.

SECTION 5. These changes will take effect on the first day of the month after publication, as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin, this 21st day of April, 2005.

Jorge Gomez
Commissioner of Insurance

Office of the Commissioner of Insurance Private Sector Fiscal Analysis

for Rule Ins 5 relating to administrative hearing procedures for OCI

This rule will have no significant effect on the private sector regulated by OCI. If anything, this rule should slightly reduce OCI costs by securing compliance with discovery rulings by the ALJ. These sanctions should reduce slightly the time and effort it takes OCI to bring administrative matters to a conclusion. The only effect on private sector regulated entities would be penalties for those entities that do not comply with valid discovery orders, default in a hearing being held involving that entity or not complying with other orders after an administrative proceeding has been commenced. The private sector entity may have sanctions imposed on them, including monetary penalties.

